

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

GE-11-11-11
10-1
47752

UNITED STATES OF AMERICA, et al

Plaintiffs,

v.

GENERAL ELECTRIC COMPANY,

Defendant.

Civil Action Nos.
99-30225, 99-30226,
and 99-30227-MAP
(consolidated)

Approved May 15, 2003

STIPULATED SETTLEMENT OF DISPUTE RESOLUTION PROCEEDING
AND SECOND MODIFICATION OF CONSENT DECREE

WHEREAS, on October 27, 2000, the Court entered a Consent Decree ("Decree") in this action among the United States, the Commonwealth of Massachusetts, the State of Connecticut, the City of Pittsfield, the Pittsfield Economic Development Authority, and the General Electric Company ("GE") relating to the GE-Pittsfield/Housatonic River Site.

WHEREAS, pursuant to the Decree, the United States and GE (the "Parties") agreed, inter alia, that the Environmental Protection Agency ("EPA") would implement the 1 ½ Mile Reach Removal Action ("Removal Action"), which is the remedy selected by EPA for the 1 ½ Mile Reach of the Housatonic River (the 1 ½ mile section of the East Branch of the Housatonic River and its

riverbanks from Lyman Street, Pittsfield, to the confluence with the West Branch of the Housatonic River), and that GE would pay for a percentage of the 1 ½ Mile Reach Removal Action Costs based on a sliding scale (100% of all such costs up to \$15 million, 70% of all such costs from \$15 million to \$25 million, 60% of all such costs from \$25 million to \$32.5 million, 50% of all such costs from \$32.5 million to \$40 million, 40% of all such costs from \$40 million to \$50 million, and 30% of all such costs in excess of \$50 million).

WHEREAS, the Decree provides that the United States shall establish a Special Account for the Removal Action ("Special Account") and that monies paid into the Special Account by GE shall be used by the United States to pay for GE's share of the 1 ½ Mile Reach Removal Action Costs.

WHEREAS, the Decree requires GE to pay into the Special Account \$1 million within 90 days of the Court's approval of the Decree (January 25, 2001), as well as four additional payments due on January 2, 2001, January 2, 2002, January 2, 2003 and January 2, 2004.

WHEREAS, the Decree provides that the amounts of these four payments are to be calculated by subtracting \$1 million from the estimated costs for the design and implementation of the Removal

Action, as set forth in EPA's Action Memorandum for the Removal Action, multiplying this amount by 25%, and determining GE's share of this amount based on the cost share formula set forth at Paragraph 103 of the Decree (each payment is also to be adjusted to account for interest earned in the Special Account and expenditures made by GE in connection with the Removal Action).

WHEREAS, on November 21, 2000, EPA issued an Action Memorandum that selected a remedy for the 1 ½ Mile Reach involving the excavation and disposal of contaminated sediment and riverbank soil and that estimated a total cost for the Removal Action of \$82.26 million, including \$17.50 million for EPA's indirect costs.

WHEREAS, based on this \$82.26 million estimate, GE's payments into the Special Account (not including the \$1 million payment due on January 25, 2001) would have been \$18,420,500 (due January 2, 2001), \$11,481,500 (due January 2, 2002), \$6,931,500 (due January 2, 2003), and \$6,094,500 (due January 2, 2004), not including any adjustments for interest earned in the Special Account or for 1 ½ Mile Reach Removal Action Costs incurred by GE.

WHEREAS, by letter to EPA dated December 21, 2000, GE asserted that EPA's \$82.26 million estimate for the cost of the

Removal Action was incorrect (1) because EPA used a revised indirect cost methodology announced by EPA in the Federal Register (65 Fed. Reg. 35339) on June 2, 2000 ("Revised Methodology") to calculate the EPA indirect cost amount for the Removal Action (\$17.50 million), as opposed to the indirect cost methodology developed by Ernst & Whinney that EPA had previously employed ("E&W Methodology"), and (2) because EPA included a 20% contingency figure (\$10.63 million) in its cost estimate. GE took the position that use of the Revised Methodology was improper because, inter alia, the parties had contractually agreed in the Decree to use the E&W Methodology to determine the EPA indirect costs associated with the Removal Action and because, in any event, the Revised Methodology was improper accounting. GE also took the position that EPA should not have included the contingency amount in the cost estimate because contingencies were intended to be dealt with pursuant to Paragraph 106.c of the Decree.

WHEREAS, EPA took the position that it had not agreed to use the E&W Methodology to calculate the indirect costs associated with the Removal Action, that the Revised Methodology was proper cost accounting, and that it had correctly included the contingency amount in the cost estimate.

WHEREAS, GE made a payment of \$18,420,500 into the Special Account on January 2, 2001.

WHEREAS, GE made a payment of \$1 million into the Special Account on January 25, 2001.

WHEREAS, the Parties reached an agreement that resolved the "contingency" aspect of their dispute, pursuant to which the Parties agreed that GE's payments into the Special Account due on January 2, 2002, January 2, 2003, and January 2, 2004, would be based on calculations that no longer included the "contingency" amount in the Removal Action cost estimate, resulting in agreed-to payment amounts of \$10,631,830 (due January 2, 2002), \$7,106,056 (due January 2, 2003), and \$5,081,830 (due January 2, 2004), not including any adjustments for interest earned in the Special Account or for 1 ½ Mile Reach Removal Action Costs incurred by GE or further adjustments that might be required as a result of the resolution of the dispute concerning the indirect cost methodology.

WHEREAS, on May 17, 2001, GE invoked formal dispute resolution with respect to the indirect cost aspect of the dispute by submitting to EPA Region 1, pursuant to Paragraph 135.a of the Decree, a Statement of Position asserting that EPA had improperly used the Revised Methodology to estimate the

indirect costs associated with the Removal Action.

WHEREAS, on November 20, 2001, EPA Region 1 issued a decision, pursuant to Paragraph 137.a of the Decree, that it had properly used the Revised Methodology to estimate the indirect costs associated with the Removal Action.

WHEREAS, on December 21, 2001, GE filed with the Court, pursuant to Paragraph 137.a of the Decree, a motion for judicial review of the dispute.

WHEREAS, on January 2, 2002, GE made a payment to the Special Account in the amount of \$9,836,892 (\$10,631,830 minus the sum of (a) \$792,110 (credit for the interest that accrued in the Special Account through September 30, 2001) and (b) \$2,828 (credit for 1 ½ Mile Reach Removal Action Costs incurred by GE)).

WHEREAS, on February 19, 2002, the United States filed a response to GE's petition; on March 19, 2002, GE filed a reply memorandum; on July 26, 2002, the United States filed a supplemental memorandum; and on September 6, 2002, GE filed a response to the United States's supplemental memorandum.

WHEREAS, on September 19, 2002, the Court heard oral argument with respect to the dispute and inquired into the Parties' efforts to settle the matter.

WHEREAS, in view of the Court's inquiry regarding settlement, as well as the unusual circumstances of this dispute, which involves a Removal Action performed by EPA and an agreement by the United States and GE to share the costs of the Removal Action on a percentage basis, which agreement was entered into prior to EPA's announcement of the Revised Methodology, the United States has agreed to settle this dispute on the terms set forth below.

WHEREAS, this Stipulated Settlement of Dispute Resolution Proceeding and Second Modification of Consent Decree ("Stipulation") is being treated as a material modification of the Decree and, therefore, pursuant to Paragraph 217 of the Decree, the Parties (1) have obtained the approval of the Commonwealth of Massachusetts and the State of Connecticut to the Stipulation, (2) will provide notice of this Stipulation to the City of Pittsfield and the Pittsfield Economic Development Authority, and (3) are seeking the Court's approval of the Stipulation.

NOW, THEREFORE, the Parties, with the approval of the Commonwealth of Massachusetts and the State of Connecticut, hereby agree as follows:

1. All terms used in this Stipulation not defined herein but defined in the Decree shall have the meaning set forth in the Decree.

2. GE's total share of the 1 ½ Mile Reach Removal Action Costs, as determined pursuant to Paragraph 103 of the Decree, shall be reduced by the Credit Amount, as defined below.

3. The Credit Amount shall be equal to \$2,375,000 adjusted up or down as follows. If the total amount of the U.S. 1 ½ Mile Reach Removal Action Costs, as set forth in the final accounting issued by EPA pursuant to Paragraph 109.c of the Decree, not including EPA indirect costs (the "Direct U.S. Removal Action Costs"), is greater than \$64.76 million, then the amount equal to 4% of the difference between the Direct U.S. Removal Action Costs and \$64.76 million shall be added to \$2,375,000 to determine the Credit Amount. If the amount of the Direct U.S. Removal Action Costs is less than \$64.76 million, then the amount equal to 4% of the difference between the Direct U.S. Removal Action Costs and \$64.76 million shall be subtracted from \$2,375,000 to determine the Credit Amount.

4. The payment made by GE to the Special Account on January 2, 2003, in the amount of \$4,963,150, satisfied GE's obligation under Paragraph 106.b of the Decree for the payment due on that

date. The payment amount was calculated as follows: \$7,106,056 minus the sum of (a) \$1,187,500 (50% of the \$2,375,000 Credit Amount prior to adjustments), (b) \$931,644 (credit for interest accrued in the Special Account from October 1, 2001 to September 30, 2002), and (c) \$23,762 (credit in connection with 1 ½ Mile Reach Removal Action Costs incurred by GE).

5. The payment to be made by GE to the Special Account due January 2, 2004 shall be in an amount equal to \$5,081,830 minus the sum of (a) \$1,187,500 (50% of the \$2,375,000 Credit Amount prior to adjustments), (b) the credit for interest accrued in the Special Account from October 1, 2002 to September 30, 2003, and (c) any credit associated with 1 ½ Mile Reach Removal Action Costs incurred by GE. The Parties may agree to an alternative payment amount for the payment due on January 2, 2004 if, prior to January 2, 2004, GE has made an additional payment to the Special Account in response to a request by EPA pursuant to Paragraph 106.c of the Decree.

6. If EPA requests that GE make a payment to the Special Account pursuant to Paragraph 106.c of the Decree, the amount of GE's payment needed to fund GE's share of the 1 ½ Mile Reach Removal Action Costs, as determined pursuant to Paragraph 103 of the Decree, shall be adjusted as follows. With respect to the

first such request, if the estimate of 1 ½ Mile Reach Removal Action Costs used by EPA to calculate GE's payment, not including EPA indirect costs, is greater than \$64.76 million, then GE's payment shall be reduced by 4% of the difference between \$64.76 million and such amount. With respect to any subsequent requests made by EPA pursuant to Paragraph 106.c of the Decree, GE's payment shall be reduced by 4% of the difference between (a) the estimate of 1 ½ Mile Reach Removal Action Costs that EPA uses to calculate GE's payment, not including EPA indirect costs, with respect to such subsequent request and (b) the greater of (i) \$64.76 million and (ii) the amount of the estimated 1 ½ Mile Reach Removal Action Costs that EPA used to calculate GE's payment, not including EPA indirect costs, for the prior request.

7. GE agrees not to challenge the United States's use of the Revised Methodology (including the indirect cost rates calculated by EPA under the Revised Methodology) to determine the amount of EPA's indirect costs in connection with (a) any bills sent by the United States to GE pursuant to Paragraphs 96 (U.S. Future Rest of River Capped Response Costs), 97 (U.S. Future Additional Sampling Costs), 98.a (U.S. Oversight Costs), 98.b (U.S. Rest of River Oversight Costs), or 99 (U.S. Post-Removal/Groundwater Monitoring Costs) of the Decree, and (b) any calculation of U.S. 1 ½ Mile Reach Removal Action Costs in

connection with the Decree. GE reserves its right, as set forth in Paragraph 101 of the Decree, to challenge the United States's use of the Revised Methodology (including the indirect cost rates calculated by EPA under the Revised Methodology) to determine the amount of EPA's indirect costs in connection with any bills sent by the United States to GE pursuant to Paragraph 95.a (U.S. Future Response Costs) of the Decree.

8. Unless expressly amended by this Stipulation, all other provisions of the Decree (as modified by the First Modification of Consent Decree filed with the Court on February 15, 2002) shall remain in effect including, but not limited to, the right of EPA under Paragraph 106.c to require GE to pay additional funds into the Special Account and the right of GE under Paragraph 106.d to request a reduction of future payments into the Special Account.

9. If, at any time prior to EPA's issuance of the final accounting pursuant to Paragraph 109.c of the Decree, EPA begins to use any indirect cost methodology other than the Revised Methodology, the United States agrees that it shall nevertheless apply the Revised Methodology to determine EPA's indirect costs associated with the Removal Action for at least the first \$64.76 million in direct costs incurred by EPA in connection with the Removal Action. For any period of time for which EPA is required

by the preceding sentence to apply the Revised Methodology to determine its indirect costs associated with the Removal Action but for which EPA has not calculated an indirect cost rate under the Revised Methodology, EPA shall apply an indirect cost rate equal to the average of the indirect cost rates calculated under the Revised Methodology for Region 1 of EPA from fiscal 2000 through the last year that such rates were calculated. If EPA decides to use an alternative indirect cost methodology other than the Revised Methodology for any period of time after EPA has incurred \$64.76 million in direct costs, then the Credit Amount shall be calculated as set forth in Paragraph 3, except that the Direct U.S. Removal Action Costs, as defined in Paragraph 3, shall equal only those direct costs that EPA used in applying the Revised Methodology to determine EPA's indirect costs associated with the Removal Action, and shall not include any direct costs incurred after EPA began using such alternative indirect cost methodology. GE reserves its right, as set forth in Paragraph 101 of the Decree, to challenge EPA's application of any such alternative indirect cost methodology to determine any of EPA's indirect costs associated with the Removal Action.

10. If the Court rejects this Stipulation, GE shall, within 30 days of the Court's rejection of the Stipulation, pay into the Special Account \$1,187,500, and the amount of GE's payment due

January 2, 2004, shall be in the amount equal to \$5,081,830 minus the sum of (a) the credit for interest accrued in the Special Account from October 1, 2002 to September 30, 2003, and (b) any credit associated with 1 ½ Mile Reach Removal Action Costs incurred by GE, unless the Court has issued an order requiring the payment of alternative amounts. The Parties may agree to an alternative payment amount for the payment due on January 2, 2004 if, prior to January 2, 2004, GE has made an additional payment to the Special Account in response to a request by EPA pursuant to Paragraph 106.c of the Decree. The Parties agree that the terms of this Paragraph 10 do not represent a material modification of the Decree and that therefore the terms of this Paragraph 10 shall be binding on the Parties even though the Court has rejected the Stipulation, unless the Court has specifically rejected the terms of this Paragraph 10.

SO ORDERED THIS ____ DAY OF _____, _____

Michael A. Ponsor
United States District Judge

FOR THE UNITED STATES OF AMERICA:

Date: 4.23.03

Tom Sansonetti

Thomas L. Sansonetti
Assistant Attorney General
Environment and Natural Resources
Division
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Date: 5/7/03

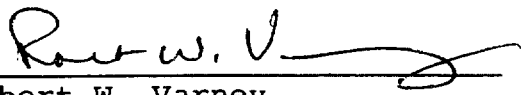
Donald G. Frankel

Donald G. Frankel
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources
Division
Department of Justice
One Gateway Center
Suite 616
Newton, MA 02458
(617) 450-0442

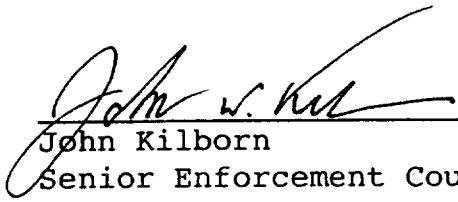
Michael J. Sullivan
United States Attorney
District of Massachusetts

Karen L. Goodwin
Assistant United States Attorney
District of Massachusetts
1550 Main Street
Springfield, MA 01103
(413) 785-0235

Date: 4-29-03


Robert W. Varney
Regional Administrator
U.S. Environmental Protection
Agency
Region I
One Congress Street -- Suite
1100 (RAA)
Boston, Massachusetts 02114

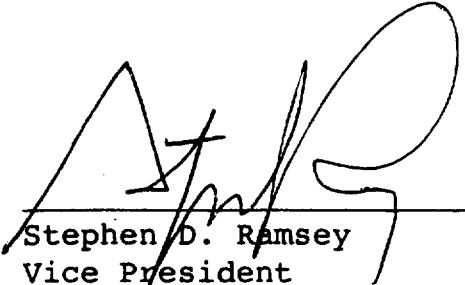
Date: 04/25/03


John Kilborn
Senior Enforcement Counsel
Office of Environmental
Stewardship
U.S. Environmental Protection
Agency
Region I
One Congress Street -- Suite
1100 (SES)
Boston, Massachusetts 02114

FOR GENERAL ELECTRIC COMPANY:

Date:

4-17-03



Stephen D. Ramsey
Vice President

Corporate Environmental Programs
General Electric Company
3135 Easton Turnpike
Fairfield, CT 06431

Date:

4/15/03




Roderic McLaren
Counsel

Pittsfield/Housatonic River
Remediation
General Electric Company
100 Woodlawn Avenue
Pittsfield, MA 02101

Date:

4/16/03



Samuel I. Gutter
Sidley Austin Brown & Wood, LLP
1501 K Street, N.W.
Washington, D.C. 20005

FOR THE COMMONWEALTH OF MASSACHUSETTS:

Pursuant to Paragraph 217 of the Decree, the Commonwealth of Massachusetts hereby approves the terms of the foregoing Stipulated Settlement of Dispute Resolution:

Date: 4/23/03

Nancy E. Harper

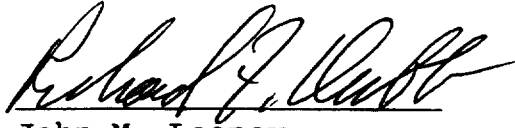
Nancy E. Harper
Assistant Attorney General
Office of the Attorney General
200 Portland Street
Boston, Massachusetts 02114

FOR THE STATE OF CONNECTICUT:

Pursuant to Paragraph 217 of the Decree, the State of Connecticut hereby approves the terms of the foregoing Stipulated Settlement of Dispute Resolution:

Date:

4/4/03



John M. Looney

Richard F. Webb

Assistant Attorneys General

55 Elm Street

P.O. Box 120

Hartford, Connecticut 06141-0120